A

ANVEST CORPORATION SDN BHD

v.

WONG SIEW CHOONG SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDULL HAMID EMBONG JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: B-02-161-2007]

C

30 JANUARY 2008

COMPANY LAW: *Winding up - Petition - Failure to pay taxed costs - Appellant seeking adjournment regarding taxed costs refused by High Court - Whether High Court's exercise of discretion in rejecting purported*

D

settlement and refusal for adjournment correct - Failure to file affidavit opposing petition - Companies (Winding-up) Rules 1972, r. 30(1) - Whether respondent has every right not to accept purported tender - Whether purported tender made by applicant a valid tender

E

The respondent (petitioner in the High Court) served a s. 218 notice to the appellant on 5 September 2005 requiring the latter to pay up certain taxed costs due to the respondent, to which the appellant did not respond. Subsequently, on 16 December 2005, the respondent presented a winding up petition against the

F

appellant. The petition debt was a sum of RM103,487.20 pursuant to an allocatur plus interest arising from taxed costs due from the appellant to the respondent from the Federal Court. The respondent further supported the petition on account of further taxed costs due namely for RM17,654.08 at the High Court and

G

RM106,869.33 at the Court of Appeal being proceedings connected with the Federal Court appeal. On 25 May 2007, the appellant stated its willingness to settle the taxed costs (the purported tender) at the Federal Court and High Court levels. As regards the taxed costs at the Court of Appeal, the appellant

H

sought an adjournment to seek instructions, to which the High Court refused. The grounds of this appeal was against the High Court's refusal to accept the purported tender for settlement which the appellant now contended as being 'unreasonable, unfair and without basis.'

I

Held (dismissing the appeal with costs)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) The exercise of the High Court's discretion in rejecting the purported settlement on the very day of the hearing of the petition and its refusal for an adjournment was, in the circumstances, not wrong. The appellant was required in law to file an affidavit in opposition to the petition, which it had not done (r. 30(1) of the Companies (Winding-up) Rules 1972). (paras 7 & 8)

(2) A petitioner is entitled to refuse a last minute tender to settle the petitioned debt; even assuming that there was indeed a valid tender proffered. The respondent had every right not to accept the purported tender. Further, there was also the question of the costs indebted to the respondent at the Court of Appeal amounting to RM106,869.33 as stated in the affidavit of debt in the list of parties attending the hearing of the petition. The purported tender made by the appellant did not include this debt, thus rendering it as not a valid tender. (paras 12 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Responden (pempetisyen di Mahkamah Tinggi) telah menyerahkan satu notis s. 218 kepada perayu pada 5 September 2005 menuntut perayu supaya membayar jumlah kos ditaksir yang terhak kepada responden. Notis bagaimanapun tidak diendahkan oleh perayu. Berikutnya, pada 16 Disember 2005, responden mengemukakan petisyen penggulungan terhadap perayu. Hutang petisyen adalah sebanyak RM103,487.20 yang terbit dari satu allocatur beserta faedah yang berbangkit dari kos ditaksir yang terhutang oleh perayu kepada responden di Mahkamah Persekutuan. Responden selanjutnya menyokong petisyen dengan kos ditaksir tambahan yang tertunggak berjumlah RM17,654.08 di Mahkamah Tinggi dan RM106,869.33 di Mahkamah Rayuan yang merupakan prosiding yang berkaitan dengan rayuan di Mahkamah Persekutuan. Pada 25 Mei 2007, perayu menyatakan kesediaannya untuk menyelesaikan kos ditaksir (purported tender) di peringkat Mahkamah Persekutuan dan Mahkamah Tinggi. Berhubung kos ditaksir di Mahkamah Rayuan, perayu memohon satu penangguhan bagi mendapatkan arahan, tetapi permohonan tersebut ditolak oleh Mahkamah Tinggi. Alasan rayuan di sini adalah terhadap

keengganan Mahkamah Tinggi untuk menerima 'purported tender' untuk penyelesaian yang dihujahkan oleh perayu sebagai 'tidak munasabah, tidak adil dan tidak berasas'.

Diputuskan (menolak rayuan dengan kos)

Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

(1) Pelaksanaan budibicara Mahkamah Tinggi dalam menolak penyelesaian yang dikatakan itu pada hari yang sama petisyen didengar dan keengganannya untuk memberi penangguhan adalah, dalam halkeadaan yang wujud, tidak salah. Di sisi undang-undang, perayu dikehendaki memfailkan satu afidavit penentangan terhadap petisyen, yang mana tidak dibuat olehnya (k. 30(1) Peraturan-Peraturan Syarikat (Penggulungan) 1972).

(2) Seorang pempetisyen berhak untuk menolak tender yang dibuat di saat-saat akhir bagi penyelesaian hutang petisyen; jikapun diandaikan ada suatu tender yang sah ditawarkan. Responden mempunyai setiap hak untuk tidak menerima 'purported tender'. Selain itu, terdapat juga persoalan kos yang terhutang kepada responden di Mahkamah Rayuan berjumlah RM106,869.33 seperti yang tercatat pada afidavit keberhutangan dalam senarai pihak-pihak yang menghadiri pendengaran petisyen. 'Purported tender' yang dibuat oleh perayu tidak termasuk hutang ini, sekaligus menjadikannya satu tender yang tidak sah.

Case(s) referred to:

Australian Mid-Eastern Club Ltd v. Yassim [1989-90] 1 ACSR 403 ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***

Occidental Life Insurance Co Of Australia Ltd v. Life Style Planners Pty Ltd [1992] III ALR 261 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218, 226(4)

Companies (Winding-up) Rules 1972, r. 30(1), (2)

For the appellant - TY Teh (Darwinder Singh & Apprao with him); M/s TY Teh & Partners

For the respondent - Logan Sabapathy (Tharminder Singh & S Bhuvaneswary with him); M/s Logan Sabapathy & Co

[Appeal from High Court, Shah Alam; Companies Winding-Up Petition No: MT4-28-311-2005]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong JCA:

[1] On 5 September 2005 the respondent (petitioner in the High Court) served a s. 218 notice to the appellant requiring the latter to pay up certain taxed costs due to the respondent. The appellant did not respond to that statutory notice.

[2] On 16 December 2005 the respondent presented a winding-up petition against the appellant which was fixed for hearing on 26 May 2006. The petition debt was a sum of RM103,487.20 pursuant to an allocatur plus interest arising from taxed costs due from the appellant to the respondent from the Federal Court. (FC Civil Appeal No. 02-5-2003)

[3] The respondent further supported the petition on account of further taxed costs due namely for RM17,654.08 at the High Court and RM106,869.33 at the Court of Appeal being proceedings connected with the Federal Court appeal. These were evinced in the creditors' debt in the list of parties who had given notice to attend the hearing of the petition.

[4] No affidavit in opposition was filed by the appellant. However at 3.27pm on the eve of the hearing date of the petition the appellants' solicitors by letter dated 25 May 2007 gave a notice of appointment of solicitors and also stated its willingness to settle the taxed costs (the purported tender) at the Federal Court and High Court levels. As regards the taxed costs at the Court of Appeal, the appellant sought an adjournment to seek instructions, to which the High Court refused.

[5] It may be noted here that the appellant is not disputing its insolvency. It merely rested its application on the purported tender of settlement.

[6] The grounds of this appeal is against the High Court's refusal to accept the purported tender for settlement which the appellant now contends as being "unreasonable, unfair and without basis".

[7] We have considered the exercise of the High Court's discretion in rejecting the purported settlement on the very day of the hearing of the petition and its refusal for an adjournment, and found that that decision had, in the circumstances, not been wrong.

[8] We reiterate the legal position that the appellant is required in law to file an affidavit in opposition to the petition, which it had not done.

Rule 30(1) of the Companies (Winding-up) Rules 1972 spells out this legal requirement, stating:

> 30. (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[9] The appellant had ample time of over five months from the date the petition was presented ie, 16 December 2005 to file its affidavit in opposition.

[10] This court had in the case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485 held that r. 30(1) of the 1972 Rules is mandatory in nature and that there must be strict compliance with it.

[11] An affidavit in opposition is crucial as this would form the basis for the winding-up court to make an appropriate order (see r. 30(2)).

[12] We are in agreement with the respondent that a petitioner is entitled to refuse a last minute tender to settle the petitioned debt; even assuming that there was indeed a valid tender proffered. This passage from the Supreme Court of New South Wales was referred to us as authority on this point, in the case of *Australian Mid-Eastern Club Ltd v. Yassim* [1989-90] 1 ACSR 403:

> However, the remaining steps in the argument do not follow. If a valid tender be made, a refusal of that tender (whether for good of bad reason, or for no reason at all) does not eliminate the debt in question. The relationship of creditor and debtor still subsists. The tender is no answer to a claim for the debt unless (as did not happen here) there is a continued readiness to pay, coupled with an actual payment into court: see *Halsbury's Laws of England,* Vol. 9, 3rd ed, Butterworths, para 289, p 169.

Meagher JA went on to say:

> Moreover, both the solicitors and their client had every reason to refuse the money: a winding up summons was on foot, and there were other creditors. The client would probably have had to return the payment in the event of a winding up order being made: see *Tellsa Furniture Pty Ltd (in liq) v. Glendave Nominees Pty Ltd* [1987] 9 NSWLR 254; 13 ACLR 64.

[13] Also, in the case of *Occidental Life Insurance Co. Of Australia Ltd v. Life Style Planners Pty Ltd* [1992] III ALR 261, the Federal Court of Australia held that a refusal of the tender did not constitute a discharge or elimination of the debt due. In that case it was found that the applicant "had every reason to refuse the tender in view of the probability of the payment being a preference in the winding-up of the company." The same concern is expressed by learned counsel of the respondent here in the acceptance of the tender since an order for a winding-up of the appellant shall under s. 226 (4) Companies Act, operate in favour of all creditors and contributories.

[14] Similarly in this case, the respondent had every right not to accept the purported tender. Further, there was also the question of the costs indebted to the respondent at the Court of Appeal amounting to RM106,869.33, as stated in the affidavit of debt in the List of Parties Attending the Hearing of the petition. The purported tender made by the appellant did not include this debt, thus rendering it as not a valid tender.

[15] For these reasons, we dismissed this appeal with costs, and affirmed the order made by the High Court.